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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2008-0114
	)	DEPARTMENT A
	)	
IN RE ANTHONY M.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. JV 200700263

Honorable Ann R. Littrell, Judge

AFFIRMED

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Michael S. Politi, Cochise County Legal Defender
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E S P I N O S A, Judge.

¶1 Appellee Anthony M. was charged by delinquency petition with driving with a drug or its metabolite in his body (DUI) and with endangerment. After an evidentiary

hearing, the juvenile court granted Anthony's motion to suppress the results of laboratory analysis of a urine sample he had provided on the day of his arrest and granted the state's motion to dismiss the delinquency petition in light of the court's suppression of the evidence. The state appealed, and this court determined in a memorandum decision that "the juvenile court [had] failed to make clear findings on the issue before it: whether Anthony had, as the state insists, voluntarily provided a sample of his urine." *In re Anthony M.*, No. 2 CA-JV 2008-0032, ¶ 5 (memorandum decision filed Aug. 14, 2008). Finding "the basis for the juvenile court's granting of Anthony's motion . . . unclear," we remanded this matter and directed the court "to enter clear findings of fact and conclusions of law relating to the issues Anthony [had] presented in his motion to suppress and during the hearing on that motion." *Id*. ¶ 6.

¶2 Upon remand, the juvenile court found Anthony had been involved in a traffic accident, that he had been taken to the hospital, and that Sierra Vista Police Officer Randall had spoken to Anthony while his mother was present, just before Anthony was released from the hospital. The court further found as follows:

> 3. After talking with the juvenile and conducting field sobriety tests, the officer directed the juvenile to provide a urine sample for drug testing and told the juvenile he would be arrested if he refused.
>
> 4. Officer Randall did not advise the juvenile of the rights and consequences provided by the implied consent law, including the right to refuse to provide a sample.

5. The juvenile provided a urine sample, because he believed he was legally required to do so and that he would be arrested if he refused to do so.

6. At a later meeting at the police station, Officer Randall told the juvenile that the urine sample had tested positive for drugs, placed the juvenile under arrest, and read the Implied Consent Affidavit form to the juvenile.

¶3 Based on these findings of fact, the juvenile court concluded as follows:

1. Under A.R.S. § 28-1321, a person who operates a motor vehicle in Arizona gives implied consent to BAC [blood alcohol concentration] testing if he is arrested for violating the DUI statutes, but that implied consent can be revoked if the person refuses to submit to a test.

2. The juvenile's right of refusal recognized in the implied consent statute was circumvented when he was told, prior to being arrested and charged, that he was required by law to provide the sample and would be arrested if he refused to do so.

3. There were no exigent circumstances that would compel the juvenile to undergo drug testing prior to arrest, in the absence of his knowing and voluntary consent.

4. The juvenile did not knowingly, voluntarily and intelligently consent to the urine testing.

The court again granted Anthony's motion to suppress the urinalysis results, and again the state has appealed.

¶4 Anthony maintains this case is now moot because he reached the age of eighteen in December 2008, and the juvenile court no longer has jurisdiction over him. Anthony is correct that, were we to reverse the juvenile court, it would lack jurisdiction with respect to the delinquency petition filed against him. *See generally* A.R.S. § 8-246(A); *see*

also In re Pima County Juv. Action No. J-70107-2, 149 Ariz. 35, 36, 716 P.2d 404, 405 (1986). But, we agree with the state that, because a decision on this issue likely will affect whether the state can prosecute Anthony as an adult, the issue is not moot. *Cf. In re Arnulfo*, 205 Ariz. 389, ¶ 1, 71 P.3d 916, 917 (App. 2003) (denying juvenile's motion to dismiss as moot state's appeal from dismissal of charges without prejudice, reasoning "the outcome of this appeal will determine whether the state can prosecute [the] Juvenile in adult court"). The state is correct that, based on the law-of-the-case-doctrine, it would be bound in an adult prosecution by the juvenile court's ruling on the motion to suppress. *See State v. Whelan*, 208 Ariz. 168, ¶ 8, 91 P.3d 1011, 1014 (App. 2004). And, the state is an aggrieved party for purposes of A.R.S. § 8-235(A). *See generally In re Frank H.*, 193 Ariz. 433, ¶¶ 6-9, 973 P.2d 1194, 1196 (App. 1998) (rejecting juvenile's claim that state was not aggrieved party for purposes of appeal statute and had standing to challenge restitution deadline on appeal). Therefore, we have jurisdiction to address the issues raised in this appeal.

¶5 "We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004) (citation omitted). Thus, "we 'defer to the trial court's factual findings absent an abuse of discretion,' but review the court's 'ultimate legal determination that the search complied with the dictates of the Fourth Amendment' de novo." *In re Tiffany O.*, 217 Ariz. 370, ¶ 9, 174 P.3d 282, 285 (App. 2007), *quoting State v. Valle*, 196 Ariz. 324, ¶ 6, 996 P.2d 125, 127

(App. 2000). We do not disturb findings "that are supported by the record and not clearly erroneous." *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000).

¶6 In examining the sufficiency of the evidence to support to the court's factual findings, we view the evidence presented at the suppression hearing and the reasonable inferences therefrom in the light most favorable to sustaining the court's ruling. *See In re Ilono H.*, 210 Ariz. 473, ¶ 3, 113 P.3d 696, 697 (App. 2005). Similarly, we review a juvenile court's finding on voluntariness for an abuse of discretion. *See In re Andre M.*, 207 Ariz. 482, ¶ 19, 88 P.3d 552, 556-57 (2004); *State v. Huerstel*, 206 Ariz. 93, ¶ 50, 75 P.3d 698, 710 (2003); *see also United States v. Lindsey*, 877 F.2d 777, 783 (9th Cir. 1989) (trial court's determination of voluntariness will not be disturbed on appeal unless clearly erroneous). The voluntariness of a consent to search "is a question of fact to be determined from the totality of the circumstances." *State v. Davolt*, 207 Ariz. 191, ¶ 29, 84 P.3d 456, 468 (2004); *cf. State v. Carillo*, 156 Ariz. 120, 122-23, 750 P.2d 878, 880-81 (App. 1987) (determination of confession's voluntariness must be based on assessment of "the totality of the circumstances and . . . whether the free will of a defendant was overcome by the actions of the police"), *vacated in part on other grounds*, 156 Ariz. 125, 750 P.2d 883 (1988).

¶7 The state first contends the juvenile court erred when it found Anthony had the right to refuse to submit to testing of his blood, breath, or urine to determine whether he was under the influence of drugs. We agree. And because the underlying premise is incorrect, we find equally flawed the court's conclusion that Anthony's "right of refusal recognized in

the implied consent statute was circumvented when he was told, prior to being arrested and charged, that he was required by law to provide the sample and would be arrested if he refused."

¶8 The implied consent statute provides:

> A person who operates a motor vehicle in this state gives consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for any offense arising out of acts alleged to have been committed in violation [of the DUI statutes.]

§ 28-1321(A). The statute also states that, if a person refuses to submit to a test of the person's blood, breath, or urine, "[t]he test shall not be given, except as provided in § 28-1388, subsection E or pursuant to a search warrant." § 28-1321(D)(1). Under the statute, therefore, a DUI suspect has the power, but not the right, to refuse to submit to such testing. *See State ex rel. Verburg v. Jones*, 211 Ariz. 413, ¶ 9, 121 P.3d 1283, 1285 (App. 2005); *Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, ¶ 19, 54 P.3d 355, 363 (App. 2002); *State v. Krantz*, 174 Ariz. 211, 215, 848 P.2d 296, 300 (App. 1992).

¶9 Nevertheless, the state has failed to sustain its burden of establishing the juvenile court abused its discretion in granting Anthony's motion to suppress. At the heart of the court's ruling was its finding that Anthony provided Officer Randall with a sample of his urine because Randall had told Anthony he was required to and if he refused, Randall would arrest him. Therefore, the court concluded, Anthony's consent to the testing of his urine was not voluntary. "When a prosecutor seeks to rely upon consent to justify the

lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

¶10 The state challenges the juvenile court's findings and conclusion on several grounds. We first address portions of the state's final argument that, in general, there was insufficient evidence to support the court's conclusion that Anthony had involuntarily consented to provide Randall a sample of his urine. The state contends Randall did not threaten Anthony and that Anthony and his mother were cooperative and polite. But Anthony and his mother testified at the suppression hearing that Randall had told them that, if Anthony refused to provide a urine sample, he would be arrested. When Anthony was asked whether he had felt he had a choice about providing the sample, he responded: "Not really. I didn't want to be arrested, so I just took it." Similarly, Anthony's mother testified the officer had told her and Anthony that state law required the officer to arrest Anthony if he refused to provide the sample. Randall's recollection of the events was murky. He could not remember what he had said and simply assumed he would have told Anthony he had probable cause to arrest him for DUI. Randall denied he would have told Anthony he would arrest him for refusing to provide the urine sample.

¶11 It was for the juvenile court to weigh the evidence and resolve any conflicts in the witnesses' testimony in ruling on the motion to suppress. *See State v. Ellison*, 213 Ariz. 116, ¶ 32, 140 P.3d 899, 911 (2006). The court clearly believed Anthony and his mother had

been told he would be arrested if he did not provide the urine sample. Consequently, the record supports the court's conclusion that Anthony's consent was involuntary; he only consented because he was threatened with arrest.

¶12 The state also appears to argue that what Randall told Anthony was true and, therefore, Anthony's consent could not have been involuntary. The state asserts Randall accurately informed Anthony that Anthony was required to provide a sample of his urine because all drivers give such consent under the implied consent law. However, whether an officer's statements were coercive does not turn on whether they were true, but whether they impermissibly caused a suspect's will to be overborne. *See State v. Tapia*, 159 Ariz. 284, 287-89, 767 P.2d 5, 8-10 (1988). The question is whether the suspect's decisions were "the product of a 'rational intellect and a free will.'" *State v. Hoskins*, 199 Ariz. 127, ¶ 28, 14 P.3d 997, 1007 (2000), *quoting Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (internal quotations omitted in *Hoskins*). And in the context of a motion to suppress, that is for the trial court to determine in the exercise of its discretion. *See State v. Boggs*, 218 Ariz. 325, ¶ 44, 185 P.3d 111, 122 (2008).

¶13 Moreover, even assuming arguendo an officer's statements to a defendant cannot be coercive if they are true, we reject the state's argument nevertheless. Although portions of what Randall told Anthony were arguably true, it was not true that Anthony was required to provide the sample without a warrant before his arrest. As the state concedes in its opening brief, a person is only required to provide a sample of blood, breath, or urine

without a warrant pursuant to the implied consent law if the person has been arrested for driving under the influence of alcohol or drugs. *See* § 28-1321(A) (person required to submit to testing of blood, breath, or urine "if the person *is arrested* for any offense arising out of acts alleged to have been committed in violation" of DUI statutes) (emphasis added); *see also* § 28-1321(B) ("*After an arrest* a violator shall be requested to submit to and successfully complete any test or tests prescribed by subsection A of this section.") (emphasis added). Randall did not arrest Anthony until after he obtained and tested a sample of Anthony's urine.

¶14 In a related argument that appears inconsistent with its concession that a person must be arrested before being required to provide a sample of blood, breath, or urine without a warrant, the state seems to suggest that probable cause to arrest a DUI suspect and an officer's intent to arrest the person can substitute for an arrest under § 28-1321(A).[1] The state cites no authority to support this implicit argument. Even assuming, without deciding,

[1]We note that the state did not make this precise argument in the juvenile court, and it neither requested nor did the juvenile court make any findings on the issue of probable cause. Virtually no testimony was presented at the suppression hearing on this subject. Randall testified he had spoken to Anthony at the school, where the accident occurred, but it was not until he saw Anthony at the hospital that Randall noticed "signs indicative of drug use." When called as a witness by Anthony, Randall never specified what those signs were, nor did he describe what field sobriety tests he had had Anthony perform, and he never explained the basis for his determination that Anthony "was under the influence" of drugs. Nor did the state elicit from Randall, when it called him as a witness, the basis for his stated belief that he had probable cause to arrest Anthony before obtaining and testing his urine. Thus, given the paucity of this record, there is no basis for finding Randall had had probable cause to arrest Anthony at that time.

Randall had intended to arrest Anthony and had had probable cause to do so before obtaining and testing Anthony's urine,[2] nothing in the clear language of the implied consent statute suggests a suspect is required to provide such a sample before the person is actually arrested. *See State v. Waicelunas*, 138 Ariz. 16, 19, 672 P.2d 968, 971 (App. 1983) ("implied consent statute becomes operative only after a person is arrested"; before arrest statute not implicated and "a person may voluntarily agree to a blood test but is free to refuse").[3]

¶15 Characterizing the consent issue as a "red herring," the state also suggests Anthony's consent could not have been involuntary because "if Anthony *had* refused to

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[2]In its response to the motion to suppress, the state explained that the urine sample was used to conduct a preliminary test for drugs. Although those results were positive, the urine was apparently sent to a laboratory for further testing. The state asserted it would not be using the preliminary test results, the accuracy of which Anthony was challenging, "for anything other than one of several indicators Officer Randall used to establish probable cause for the Juvenile's arrest . . . ."

[3]Although our supreme court rejected *Waicelunas* in *State v. Cocio*, 147 Ariz. 277, 283, 709 P.2d 1336, 1344 (1985), it only did so insofar as *Waicelunas* could be viewed as applying to former A.R.S. § 28-692(M), now numbered as A.R.S. § 28-1388(E). *See* 1998 Ariz. Sess. Laws, ch. 302, § 27. Enacted after *Waicelunas* was decided, that subsection of the statute permits law enforcement to obtain a separate blood sample for testing, before the person is arrested, when a sample has already been obtained for medical purposes by hospital personnel and the officer has probable cause to believe the person had been driving under the influence of alcohol or drugs. That provision is not implicated here. The court held in *Cocio* that "a formal arrest of a defendant is not a constitutional prerequisite to the obtaining of a blood sample pursuant to A.R.S. § 28-692(M)." 147 Ariz. at 283, 709 P.2d at 1344. Thus, *Waicelunas* is still good law as it pertains to all other provisions of the implied consent law. This court's decision in *State v. Salazar*, 146 Ariz. 547, 551, 707 P.2d 951, 955 (App. 1985), is similarly distinguishable. *See also State v. Estrada*, 209 Ariz. 287, ¶ 12, 100 P.3d 452, 455 (App. 2004) (distinguishing blood obtained without a warrant pursuant to § 28-1388(E); noting under implied consent law person consents to testing "if he or she is arrested for violating the DUI statutes").

submit to the urine test, Officer Randall *would have* arrested him based on the probable cause established through the standardized FSTs [field sobriety tests] administered at the hospital." But again, even assuming that were true, Randall also informed Anthony that he would be arrested if he refused to provide Randall with a urine sample, implying Randall had the lawful right to arrest Anthony solely for refusing. This was an incorrect statement of the law. Although there are consequences under the implied consent law for refusing to submit to such testing, including suspension of a person's driver's license for one year, *see* § 28-1321(G)(3), arrest for such a refusal is not among them. And it was this erroneous, coercive statement that the juvenile court found prompted Anthony to provide the urine sample.

¶16 We find unpersuasive both *State v. Schumacher*, 37 P.3d 6 (Idaho Ct. App. 2001), and *State v. Medenbach*, 616 P.2d 543 (Or. Ct. App. 1980), on which the state relies in its reply brief. In *Schumacher*, the court noted certain kinds of deceptive tactics by law enforcement officers designed to elicit incriminating statements are acceptable and not necessarily coercive, including misrepresentations of facts such as the officers' false statement in that case that they had a search warrant. 37 P.3d at 14. Significantly, however, the court added that, in determining whether statements are the result of police coercion, "'courts are much less likely to tolerate misrepresentations of law.'" *Id*., *quoting State v. Davila*, 908 P.2d 581, 585 (Idaho Ct. App. 1995).

¶17 In *Medenbach*, the officer had stopped the defendant who was driving erratically and essentially told him if he did not perform field sobriety tests the officer would

arrest him. 616 P.2d at 544. The trial court found this coercive and, for this and other reasons, granted the defendant's motion to suppress statements he had made before he was arrested. *Id*. On appeal, the court found the officer's conduct "was not constitutionally objectionable coercion because the trooper then had probable cause to arrest defendant for driving under the influence. Therefore, the officer threatened 'only to do what the law permitted him to do.'" *Id*. at 545, *citing State v. Douglas*, 488 P.2d 1366, 1373 (1971). Here, as already noted, Arizona's implied consent law did not give Randall the right to arrest Anthony for refusing Randall's request to provide a urine sample without a warrant.

¶18 Because the state has not sustained its burden of establishing the juvenile court abused its discretion, we affirm the court's order granting Anthony's motion to suppress.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge